



CITY OF ROANOKE OFFICE OF THE CITY MANAGER

Noel C. Taylor Municipal Building
215 Church Avenue, S.W., Room 364

Roanoke, Virginia 24011-1591

Telephone: (540) 853-2333

Fax: (540) 853-1138

CityWeb: www.roanokegov.com

November 15, 2004

Honorable C. Nelson Harris, Mayor
Honorable Beverly Fitzpatrick, Jr., Vice Mayor
Honorable M. Rupert Cutler, Council Member
Honorable Alfred T. Dowe, Jr., Council Member
Honorable Sherman P. Lea, Council Member
Honorable Brenda L. McDaniel, Council Member
Honorable Brian J. Wishneff, Council Member

Dear Mayor Harris and Members of City Council

Subject: Performance Agreement for an
Economic Development Grant: IMD
Investment Group, LLC

Background:

The City and IMD Investment Group, LLC, (IMD), the developer of property located at the northwest corner of Franklin Road and Wonju Street, S.W., have negotiated an annual Economic Development Grant Performance Agreement. The Economic Development Grant will be funded by the City, but issued and administered through the Industrial Development Authority of the City of Roanoke, Virginia (IDA). Such grant would assist in the provision of necessary infrastructure to make the site developable and to provide structured parking so that high quality retail activity, including a Ukrop's grocery store, a drug store, and associated retail, office, and restaurant space may be constructed on the property. Currently, the site is located entirely within a floodway and flood plain and has limited development potential. IMD's plans for this site include the improvement of flood control infrastructure and filling of the site so as to remove it from the flood plain and, therefore, make it developable, and an economic benefit to the City and its citizens. The project will provide additional tax revenue, jobs, and services that will be available to and benefit the citizens of the City and the Roanoke Valley.

Consideration:

The proposed Agreement outlines the obligations of IMD in order to qualify for and receive the grant, including successful rezoning of the site to accommodate the proposed development; the construction and opening of a minimum 58,000 square foot Ukrop's Supermarket and a drug store within 24 months of the date of the Agreement; and IMD entering into a 15 year or longer lease with Ukrop's. In addition, within

the first 24 months of the date of the Agreement, IMD shall have spent or caused to be spent at least \$3 million in site infrastructure improvements and one floor of structured parking either under the Ukrop's store or one level below the surface parking lot that will be located between the Ukrop's store and Franklin Road.

Within 60 months of the date of the Agreement, IMD shall have spent or caused to be spent an additional \$3 million on structured parking spaces and site infrastructure. In addition, within the same 60 months, a minimum of 60,000 square feet of additional buildings containing a combination of restaurants, retail and office space are to be constructed, or the amount of the grant may be reduced.

Subject to IMD fulfilling its obligations as enumerated above, the IDA will provide certain funds annually to IMD, as received from the City, to assist with the development of the site infrastructure and structured parking. Beginning at the option of IMD upon the opening of the Ukrop's grocery store, IMD may request an annual grant for 15 consecutive years. The amount of the grant shall equal the amount of revenue actually received by the City during the preceding grant year resulting directly from the property including real estate taxes, general retail sales tax (currently the local option of 1%), professional and occupational license tax, tangible personal property tax, prepared food and beverage tax, electric consumer utility tax, natural gas utility tax, and water utility tax. However, any future increases in any of those taxes dedicated for specific purposes or projects will be excluded from the annual calculation.

The request cannot be for an amount greater than \$600,000 for each year, even if total revenue resulting for the development generated by the taxes enumerated above exceeded that amount. There shall be no carry-forward for funds from one grant year to the next. Furthermore, if IMD fails to provide the additional building development required within the 60 month timeframe of the Agreement, the requested grant shall only be in an amount equal to fifty percent (50%) of actual revenue received from the development, with the same \$600,000 per year limit on any such request.

The Agreement requires IMD to report to the City and the IDA on a semi-annual basis on its progress and compliance with the conditions of the Agreement, and to provide appropriate supporting documentation for each grant request. Funding for each annual grant request will be subject to appropriation by the City Council to the IDA. The annual appropriation will be in an amount equal to the anticipated grant request for actual revenues received for the preceding grant year, not to exceed \$600,000 in any grant year.

A copy of the proposed Agreement is attached to this report for the City Council's review and information.

Recommended Action:

Approve the terms of the Performance Agreement among the City, IMD, and the IDA, as set forth in the attachment to this letter, and determine that such grant will promote economic development within the City.

Authorize the City Manager to execute a Performance Agreement among the City, IMD, and the IDA, substantially similar to the one attached to this letter, and to execute such other documents and take such further action as may be necessary to implement and administer such Performance Agreement, with the form of such Agreement to be approved by the City Attorney.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Darlene L. Burcham". The signature is fluid and cursive, with a large initial "D" and "B".

Darlene L. Burcham
City Manager

Attachment

cc: William M. Hackworth, City Attorney
Jesse A. Hall, Director of Finance
Mary F. Parker, City Clerk
Rolanda Russell, Assistant City Manager for Community
Development
Brian Townsend, Director, Planning Building and Development
Dennis Cronk, Chairman, Industrial Development Authority

PERFORMANCE AGREEMENT

This Performance Agreement (Agreement) is dated November ____, 2004, by and among the City of Roanoke, Virginia, a municipal corporation (City), IMD Investment Group, LLC, a Virginia Limited Liability Company (IMD), and the Industrial Development Authority of the City of Roanoke, Virginia, an industrial development authority organized and existing under the laws of the Commonwealth of Virginia (IDA),

WITNESSETH:

WHEREAS, IMD has proposed a development of certain property located at the northwest corner of Wonju Street and Franklin Road, SW, consisting of tax map numbers 1272504, 1272505, 1272507, 1150103, 11505106, 1150108, and 1150109 (Property);

WHEREAS, the City recognizes that the development of the site will require significant cost for site development as well as structured parking in order to attract high quality retail activity;

WHEREAS, IMD intends to develop the Property by placing a grocery store, drug store, and other buildings consisting of retail, restaurant, and office space, and structured parking spaces, with associated infrastructure, for such businesses on the Property (Project);

WHEREAS, IMD has requested an annual economic development grant through the IDA to assist in the unusual expense for development of the Project;

WHEREAS, the City and the IDA desire that the Project proceed and have determined that such Project will promote economic development within the City and within the Roanoke Valley. Such Project will provide additional tax revenue, jobs, and services that will be available to and benefit the citizens of the City and the Roanoke Valley;

WHEREAS, the IDA, based on the undertakings of IMD, has determined to make an annual economic development grant for a specified period to IMD from funds to be provided to the IDA by the City in accordance with the terms of this Agreement; and

WHEREAS, the parties wish to reduce to writing the understanding of the parties concerning this matter.

NOW, THEREFORE, the parties, in consideration of the promises and obligations contained herein, mutually agree as follows:

Section 1. IDA Economic Development Grant.

The IDA will make an annual Economic Development Grant (Grant) to IMD in accordance with the terms of this Agreement in order to assist with the development of the structured parking spaces and associated infrastructure for the Project for the purposes of promoting economic development in the City and the Roanoke Valley. The IDA's obligations hereunder are not general obligations of the IDA, but are special obligations of the IDA limited to those funds which are provided by the City and received by the IDA under the terms set forth herein.

Section 2. Obligations of IMD.

IMD agrees and promises that in order to qualify to receive and continue to receive the Grant for each grant year (as defined in this Agreement), IMD will do or provide each of the following:

- A. Obtain rezoning of the Property to an appropriate designation for the purposes described in this Agreement, which is anticipated to be an INPUD designation.
- B. Within 24 months after the date of this Agreement, a Ukrop's Super Markets grocery store (Ukrop's) with a minimum of 58,000 sq. ft. will be opened to the public for business on the Property.
- C. IMD shall enter into a 15 year or longer base lease with Ukrop's. Such lease shall contain a provision that will allow IMD the right to terminate the lease in the event of a "going dark" period. In the event Ukrop's defaults on its lease with IMD which gives IMD the right to terminate, or IMD is entitled to re-let the premises, IMD agrees to provide the City and the IDA with written notice of such default or event within 45 days thereof. Upon receipt of such notice, the City, the IDA, and IMD will use their collective best efforts to identify and recruit a quality retail tenant, not then currently located within the City. ("Replacement Tenant Process") In the event IMD fails to provide such notice to the City and the IDA, the City and/or the IDA may terminate this Agreement after providing IMD's lenders the opportunity to cure such default. The City and/or the IDA shall provide such lenders with written notice of IMD's default and the lenders shall have 45 days from receipt of such notice to cure such default by requiring IMD to engage in the Replacement Tenant Process and/or by the lenders, or their designated representatives, participating in such Replacement Tenant Process as set forth above with the City and/or the IDA.
- D. Within 24 months after the date of this Agreement, a drug store, anticipated to be a Walgreens, will be opened to the public for business on the Property.
- E. Within 24 months after the date of this Agreement, IMD will have spent or caused to have been spent at least Three Million Dollars (\$3,000,000) on infrastructure (such costs shall not include the land costs or the costs of the Ukrop's grocery store or the drug store or any additional buildings mentioned in Section 2(F) below) on the Property and one floor structured parking either under the Ukrop's grocery store or

one level below the surface parking lot that will be located between the Ukrop's grocery store and Franklin Road which will have the maximum number of parking spaces allowed by law, regulation or ordinance, which will be available for use for the Project. Within 60 months after the date of this Agreement, IMD will have spent or caused to have been spent an additional Three Million Dollars (\$3,000,000) over and above the initial Three Million Dollars (for a total of at least Six Million Dollars (\$6,000,000)) on additional structured parking spaces which will result in a total of at least 516 structured parking spaces (which does not include surface parking lots) on the Property and additional infrastructure (such costs shall not include the two buildings mentioned above or the additional buildings mentioned in Section 2(F) below) on the Property, which will be available for use for the Project.

- F. Within 60 months after the date of this Agreement, buildings, in addition to the two mentioned above, containing restaurants, retail and office space having a minimum of 60,000 sq. ft. will be leased or available for lease on the Property and continue thereafter to be leased, available for lease or purchase for each year for which a Grant is requested. It is expressly understood and agreed that while the anticipated use of this space is for restaurant(s), retail, and office(s), the exact size and exact mix cannot be determined at this point, only that such buildings will provide the minimum 60,000 sq. ft. mentioned above.
- G. IMD will file all appropriate and applicable real estate tax, and other tax forms or notices with the City, ensure that it has received assessments from the City for such taxes, and it will have paid such taxes to the City and not claimed any exemptions from real estate taxes, or other taxes for any periods of time for which Grant funds are requested.

Section 3. Economic Development Grant.

Subject to the conditions as set forth in this Agreement, the IDA will provide certain Grant funds, limited to those funds which are received by the IDA from the City, as set forth below, to IMD, in order to assist with the development of the structured parking spaces, and with associated infrastructure, for the Project as follows:

- A. At the option of IMD, a yearly Grant for (i) the grant year starting as of July 1, following the date the Ukrop's grocery store starts operations (which will be a short year) or (ii) the grant year after the Ukrop's grocery store starts operations, provided IMD submits a request to the IDA each year for such a Grant and provides the IDA sufficient documentation as to IMD's compliance with this Agreement. For purposes of this Agreement, a "grant year" means July 1 through June 30 (for example, if Ukrop's opens on November 15, 2005, IMD may select as the first grant year the period beginning (i) July 1, 2005 to June 30, 2006 or (ii) July 1, 2006 to June 30, 2007).

- B. Such Grant may be requested only for a total of 15 consecutive years, which will include the first Grant request. All Grant requests must be submitted to the IDA between the period of September 1 and December 1, for the preceding grant year or no Grant will be considered or given for that particular year. For example, if IMD wants to make a request for the grant year of July 1, 2005 to June 30, 2006, IMD must do so between September 1, 2006, and December 1, 2006. The City will cooperate with IMD by providing all public information relevant to tax revenue received from the Property or the Project so as to allow IMD to make such request.
- C. The amount of each Grant request can be up to an amount equal to the amount of revenue the City actually received during the preceding grant year, subject to the limit set forth herein, that directly resulted from the Property or Project and that came from real estate taxes, the City's portion of general retail sales tax (currently the local option is 1%), professional and occupational license tax, tangible personal property tax, (inclusive of tangible personal property used in business), prepared food and beverage tax, electric consumer utility tax, and natural gas utility tax, and water utility tax. Any new local tax that replaces, is a substitute for, or is in lieu of any of the aforementioned taxes shall be included in the tax revenue directly resulting from the Property or Project. However, any new local tax or increase in the rate of any of the aforementioned taxes for the purpose of dedicating the incremental revenue for a specific project or purpose shall be excluded from the tax revenue resulting from the Property or Project. In no event shall any request be for an amount greater than \$600,000 for each year, even if the amount of the above revenue exceeds \$600,000 for such period of time. Furthermore, there shall be no carryover from one grant year to the next for any funds from the prior year or years. Provided further, if IMD fails to provide for the additional Three Million Dollars (\$3,000,000) investment and additional structured parking spaces and infrastructure referred to in Section 2(E) above and fails to provide the buildings referred to in Section 2(F) above, within the 60 month time period, the amount of any requested Grant thereafter shall only be an amount equal to 50% of the amount of the above mentioned revenue actually received by the City as mentioned above with the same \$600,000 per year limit on any such request. (In such a case such revenue actually received by the City would need to be \$1,200,000 or greater in order for the Grant to reach the \$600,000 limit.)
- D. The IDA will review each Grant request. After approval of such request, the IDA will promptly request funds from the City to fund such approved request. Subject to the terms in this Agreement, the City agrees to fund such approved request within 45 days of the request from the IDA. The IDA's obligations shall be limited to those funds which the IDA shall receive from the City and shall not be a general obligation, but a special obligation of the IDA.

Section 4. Payment of IDA's Fees.

IMD will pay the reasonable costs and expenses of the IDA in connection with this matter, including the reasonable fees of IDA's counsel, and IMD agrees that IMD's payment of such items will not be paid from the Grant funds. The IDA will submit itemized statements to IMD for such costs and expenses.

Section 5. Reports to the IDA and City.

During the term of this Agreement, IMD agrees to report to and provide the IDA and the City on an semi-annual basis, on or before June 30 and December 31 of each year, sufficient information related to IMD's compliance with the conditions of this Agreement and to provide appropriate documentation to support such compliance and to allow the City and/or its representative to inspect, audit, copy, or examine any of IMD's books, documents, or other relevant material in connection therewith upon written request by the IDA or the City. All such documents, information (including electronic data), or access shall be provided or made available within thirty (30) days of a written request from either the IDA or the City. Provided, however, that any such audit or examination will not be more frequent than twice a year.

Section 6. Compliance with Laws.

IMD agrees, in undertaking and completing the Project, to comply with all applicable federal, state and local laws, rules and regulations.

Section 7. Cooperation.

Each party agrees to cooperate with the other in a reasonable manner to carry out the intent and purpose of this Agreement.

Section 8. Severability.

If any term of this Agreement is found to be void or invalid, such invalidity shall not affect the remaining terms of this Agreement, which will continue in full force and effect. The parties intend that the remaining provisions of this Agreement be enforced to the fullest extent permitted by applicable law.

Section 9. Authority to Sign.

The persons who have executed this Agreement on behalf of the parties represent and warrant that they are duly authorized to execute this Agreement in their representative capacities as indicated.

Section 10. Counterpart Copies.

This Agreement may be executed in any number of counterpart copies, each of which shall be deemed an original, but all of which together shall constitute a single instrument.

Section 11. Successors.

The terms, conditions, provisions and undertakings of this Agreement shall be binding upon and inure to the benefit of each of the parties hereto and their respective successors and assigns.

Section 12. Nondiscrimination.

- A. During the performance or term of this Agreement, IMD agrees as follows:
 - i. IMD will not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin, age, disability, or any other basis prohibited by state law relating to discrimination in employment, except where there is a bona fide occupational qualification reasonably necessary to the normal operation of IMD. IMD agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.
 - ii. IMD in all solicitations or advertisements for employees placed by or on behalf of IMD will state that IMD is an equal opportunity employer.
 - iii. Notices, advertisements and solicitations placed in accordance with federal law, rule or regulation shall be deemed sufficient for the purpose of meeting the requirements of this section.
- B. IMD will include the provisions of the foregoing Section A (i, ii, and iii) in every subcontract or purchase order of over \$10,000, so that the provisions will be binding upon each subcontractor or vendor.

Section 13. Assignment.

IMD agrees not to assign or transfer any part of this Agreement without the prior written consent of the City and the IDA, which will not be unreasonably withheld, delayed or conditioned and any such assignment shall not relieve IMD from any of its obligations under this Agreement. Notwithstanding the foregoing, IMD may assign or pledge this Agreement, provided any such assignment or pledge includes IMD's obligations thereunder, without the consent of the City or the IDA as security in connection with the financing for the Project, but IMD must give the City and the IDA 30 days written notice before such assignment.

Section 14. Indemnity.

IMD agrees to indemnify and hold harmless the IDA, the City, and their officers, directors, and employees free and harmless for and from any and all claims, causes of action, damages or any liability of any type, including reasonable attorney's fees, on account of any claims by or any injury or damage to any persons or property growing out of or directly or indirectly resulting or arising in any way out of any actions, omissions, or activities of IMD or its agents, employees or representatives arising out of or connected in any way to any of the matters involved in this Agreement or any performance thereunder, except to the extent caused solely by the actions, omissions, or activities of the City or the IDA.

Section 15. Opportunity for IMD to Cure.

Except for the requirements contained in Sections 2(A, B, C, D, E and F) above, IMD shall not be deemed to have failed to perform or discharge any of its duties or obligations hereunder until such time as IMD receives written notice thereof and an opportunity to cure within thirty (30) days after written notice thereof, which notice shall specify the failure, or, if the failure is of such nature that it could not reasonably be cured within such thirty (30) day period and IMD does, within said thirty (30) day period, commence to cure it and thereafter proceed, with due diligence, to cure it as soon as is reasonably practicable under the circumstances, such failure shall be deemed cured.

Section 16. Forum Selection and Choice of Law.

By virtue of entering into this Agreement, IMD agrees and submits itself to a court of competent jurisdiction in the City of Roanoke, Virginia, and further agrees that this Agreement is controlled by the laws of the Commonwealth of Virginia, with the exception of Virginia's choice of law provisions which shall not apply; and that all claims, disputes and other matters shall be decided only by such court according to the laws of the Commonwealth of Virginia as aforesaid.

Section 17. Nonwaiver.

Each party agrees that any party's waiver or failure to enforce or require performance of any term or condition of this Agreement or any party's waiver of any particular breach of this Agreement by any other party extends to that instance only. Such waiver or failure is not and shall not be a waiver of any of the terms or conditions of this Agreement or a waiver of any other breaches of the Agreement by any party and does not bar the nondefaulting party from requiring the defaulting party to comply with all the terms and conditions of this Agreement and does not bar the nondefaulting party from asserting any and all rights and/or remedies it has or might have against the defaulting party under this Agreement or at law.

Section 18. Captions and Headings.

The section captions and headings are for convenience and reference purposes and shall not affect in any way the meaning or interpretation of this Agreement.

Section 19. Easements.

IMD promises and agrees to grant and dedicate to the City and/or the Western Virginia Water Authority all necessary easements on IMD's Property for the construction of infrastructure improvements needed for or benefiting the Project or surrounding areas including, but not limited to, storm drainage, sanitary sewers, and/or water, all at no cost to the City and/or the Western Virginia Water Authority.

Section 20. Appropriation of Funds.

The City will make good faith efforts to fund the approved Grant requests from the IDA for the Project. However, all such obligations or funding undertaken by the City or the IDA in connection with the Project or this Agreement are subject to the availability of funds and the appropriation of such funds by City Council as may be necessary for such obligations or funding.

Section 21. Performance.

If IMD fails to comply with any of the obligations of this Agreement, IMD will not be entitled to be eligible for and/or receive and/or continue to be eligible for and/or receive any such Grants or Grant funds as referred to above or in this Agreement, except as may otherwise be set forth in this Agreement.

Section 22. Notices

All notices hereunder must be in writing and shall be deemed validly given if sent by certified mail, return receipt requested or by a nationally recognized overnight courier, addressed as follows (or any other address that the party to be notified may have designated to the sender by like notice):

If to City, to: City of Roanoke, City Manager
364 Noel C. Taylor Municipal Building
215 Church Avenue SW
Roanoke, Virginia 24011
Fax No. 540-853-1138

With a copy to: Director of Economic Development
111 Franklin Plaza, Suite 200
Roanoke, VA 24011
Fax No. 540-853-1213

If to IMD, to:

Bland A. Painter, III
Sole Member and Manager
IMD Investment Group, LLC
5422 Lee Highway
Troutville, VA 24175
Fax No. (540)992-1500

Notice shall be deemed delivered upon the date of personal service, two days after deposit in the United States mail, or the day after delivery to a nationally recognized overnight courier.

Section 23. Force Majure.

A delay in, or failure of, performance by any party, shall not constitute a default, nor shall the IMD, the City or IDA be held liable for loss or damage, or be in breach of this Agreement, if and to the extent that such delay, failure, loss, or damage is caused by an occurrence beyond the reasonable control of such party, and its agents, employees, contractors, subcontractors, and consultants, which results from Acts of God or the public enemy, compliance with any order of request of any governmental authority or person authorized to act therefore, acts of declared or undeclared war, public disorders, rebellion, sabotage, revolution, earthquake, floods, riots, strikes, labor or employment difficulties, delays in transportation, inability of party to obtain necessary materials or equipment or permits due to existing or future laws, rules, or regulations of governmental authorities or any other causes, whether direct or indirect, and which by the exercise of reasonable diligence said party is unable to prevent. For purposes of this Agreement any one delay caused by any such occurrence shall not be deemed to last longer than 6 months and all delays caused by any and all such occurrences under any circumstances shall not be deemed to last longer than a total of 9 months. Any party claiming a force majeure occurrence shall give the other parties written notice of the same within 30 days after the date such claiming party learns of or reasonably should have known of such occurrence, or any such claim of force majeure shall be deemed waived. In no event shall a force majeure occurrence give IMD the right to substitute a new tenant in the place of Ukrop's. Notwithstanding anything else set forth above, after a total of 9 months of delays of any type have been claimed as being subject to force majeure, no further delays or claims of any type shall be claimed as being subject to force majeure and/or being an excusable delay.

Section 24. Entire Agreement.

This Agreement constitutes the entire agreement of the parties and supersedes all prior agreements between the parties. No amendment to this Agreement shall be valid unless made in writing and signed by the appropriate parties.

IN WITNESS WHEREOF, the parties have executed this Performance Agreement by their authorized representatives.

ATTEST:

CITY OF ROANOKE

City Clerk

By: _____
Darlene L. Burcham, City Manager

(SEAL)

WITNESS:

R. Neal Keese, Jr.
R. Neal Keese, Jr.
Printed Name and Title
(SEAL)

WITNESS:

_____, Secretary

Approved as to Form:

City Attorney

Date: _____

Appropriation of Funds Required for
this Agreement are subject to future
appropriation:

Director of Finance

Date Acct. #

IMD Investment Group, LLC

By: Bland A. Painter, III
Bland A. Painter, III, Sole Member and Manager

INDUSTRIAL DEVELOPMENT AUTHORITY
OF THE CITY OF ROANOKE, VIRGINIA

By _____
Dennis R. Cronk, Chair

Approved as to Execution:

City Attorney

Date: _____